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July 25, 2012

VIA ELECTRONIC MAIL

The Honorable Eileen Bransten
New York State Supreme Court,
Commercial Division
60 Centre Street, Room 442
New York, NY 10007

Re: MBIA Insurance Corp. v. Countrywide Home Loans, Inc., et. al., No. 08-602825

Dear Justice Bransten:

We represent Plaintiff MBIA Insurance Corporation (“MBIA”) in the above-captioned matter. We write respectfully to ask the Court’s permission to file a motion lifting the confidentiality restrictions on certain documents exchanged in discovery in this matter. Specifically, MBIA intends to move an order removing the “Confidential” and/or “Highly Confidential” designations from five categories of documents that will be central to the parties’ upcoming summary judgment briefing: (1) party deposition transcripts; (2) documents used as exhibits in party depositions; (3) expert reports; (4) documents used as exhibits to expert reports; and (5) materials relied on by expert witnesses. MBIA seeks only to de-designate material produced by the Countrywide Defendants (“Countrywide”) and Defendant Bank of America Corporation (“BAC”), and would not object to de-designating material that it has stamped “Confidential”; MBIA does not seek to de-designate depositions of third party witnesses or material produced by third parties.

Prior to submitting this letter to Your Honor, my partner Jonathan Oblak sent a letter on July 18, 2012, to counsel for Defendants asking their consent to the relief requested, and asking for a response before 5:00 p.m. on Friday, July 20. Counsel for BAC responded just before that deadline only that he “will get back to you next week.” On Tuesday, July 24, 2012, not having received a response, Mr. Oblak sent an e-mail to counsel for BAC and Countrywide indicating

that, absent a response from them, MBIA would proceed with sending this letter to the Court today. Later that night, counsel for BAC responded with a letter that rejects MBIA's request for relief, asserting, *inter alia*, that MBIA bears the burden of identifying specific BAC documents that should be de-designated, rather than that BAC bears the burden of identifying specific documents that warrant a confidentiality designation. Countrywide joined BAC's response. Given the parties' disagreement, and the upcoming summary judgment briefing and a need for a determination of the documents' confidentiality status, MBIA is proceeding with this letter to the Court.

A. Factual Background

On February 24, 2009, the parties agreed to a Stipulation and Order for the Production and Exchange of Confidential Information (the "Protective Order"), which the Court "so ordered" on April 22, 2009. The Protective Order contains explicit thresholds that must be met for material exchanged in discovery to be designated as Confidential or Highly Confidential. "Confidential Information" is defined as:

[A]ll Discovery Material,¹ and all information contained therein, and other information designated as confidential, if such Discovery Material contains trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party's business or the business of any of that party's customers or clients. The parties agree that Discovery Material identifying individual borrowers, their addresses, and other personal information concerning such borrowers, constitutes Confidential Information. The parties further agree to abide by all federal, state, and local statutes and regulations concerning the use and dissemination of such Confidential Information.

Stipulated Protective Order at ¶ 3(a).

The designation of a document as "Confidential" imposes strict restrictions on the use of that document. Confidential Information may only be furnished, shown, or disclosed to a narrowly-defined group of persons. *Id.*, ¶ 5. Parties must take steps to preserve the confidentiality of the information prior to disclosing it during any hearing or trial. *Id.*, ¶ 9. And a party may only file Confidential Information with the Court (i) after giving notice to the other

¹ Paragraph 1 of the Stipulated Protective Order defines Discovery Material to include: "documents, depositions, deposition exhibits, interrogatory responses, admissions, and any other information or material produced, given or exchanged by and among the parties and any non-parties...in connection with discovery in this litigation." Protective Order ¶ 1.

parties so they can move to seal the information, or (ii) in a sealed envelope indicating its contents. *Id.*, ¶ 12.

Under the terms of the Protective Order, material may be defined as “Highly Confidential” if:

- (1) at the time of the designation the Discovery Material contains or constitutes trade secrets or confidential business or financial information,
- (2) there is a substantial and imminent risk that, absent such designation, its receipt by the Receiving party could cause competitive and/or economic harm to the Producing party, and
- (3) such Discovery Material would not otherwise be adequately protected under the procedures set forth herein for Confidential Information.

Id., ¶ 17.

The designation of material as “Highly Confidential” imposes all of the restrictions applied to Confidential Information and more. Highly Confidential information may not be disclosed to any party, including its officers, directors, employees, or agents. *Id.* It may only be disclosed to a party’s counsel (including certain in-house counsel). *Id.*

Throughout this litigation, the parties have broadly designated information as Confidential or Highly Confidential. Much of the material Defendants have designated as Confidential or Highly Confidential concerns events that are now more than four years old. This material contains no trade secrets, proprietary business information, or other competitively sensitive information, and its disclosure would not present any competitive or economic harm to BAC or Countrywide. As we approach the filing of summary judgment papers and then trial, the liberal use of these confidentiality designations threatens to create unnecessary burdens for both the parties and the Court.

To the extent that documents do not meet the Protective Order’s criteria for “Confidential” or “Highly Confidential” documents, the parties should not be required to treat them as if they did. Specifically, the parties should not have to seek sealing orders to file documents with stale, non-confidential information, the disclosure of which would not harm any party. Well-settled New York law holds that “there is a broad presumption that the public is entitled to access to judicial proceedings and court records.” *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 578 (1st Dep’t 2010) (holding that “civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly.”). This Court, moreover, has instructed the parties on multiple occasions to limit the number of documents they seek to file under seal. On January 22, 2009, the Court instructed the parties that it expected “rather detailed papers” on a sealing motion, “because I’m not one to grant that willy-nilly.” 1/22/09 Tr. at 48:22-49:5. The parties subsequently filed all motion to dismiss papers under seal, and the Court admonished the parties that, “[y]ou know, there is going to be some new sealing issues coming up which are going to tighten up the ship a great deal. What both sides believe is absolutely a sealable event is not going to be found sealable by this Court very

much longer. . . . *So, sealing really means something that is of utmost importance to the inner core of the existence of the various corporations.*” 12/9/09 Tr. at 6:9-22 (emphasis added). During a subsequent hearing, the Court reminded the parties that, “[t]his is an open court, this is an open courthouse,” and that confidentiality should be restricted to documents that “go[] to the fundamental being of the individuals involved, the corporations involved.” 9/27/10 Tr. at 46:13-17.

In light of New York law and the Court’s admonitions regarding sealing, MBIA asked Countrywide and BofA on September 16, 2011, to agree to de-designate “all documents and transcripts, other than those containing non-public personal information” MBIA raised the issue well in advance of the submission of expert reports and summary judgment papers to give the parties time to reach an agreement on the de-designation of documents. In subsequent correspondence, MBIA has acknowledged that loan file documents containing a borrower’s private information, for example, may properly be designated Confidential or Highly Confidential. By letter dated October 21, 2011, Countrywide objected that MBIA’s requests were premature and unduly burdensome. Countrywide declined to “review anew over *10 million pages of documents* previously designated by Countrywide as Confidential or Highly Confidential, regardless of whether MBIA has any intention of ever introducing a particular document in this action.” (Emphasis in original).

Countrywide’s objections are without merit. First, the impending summary judgment deadlines moot the assertion that MBIA’s request is premature. The combination of Defendants’ over-designation of documents and the severe restrictions on the use of Confidential and Highly Confidential Information threaten to make summary judgment briefing, not to mention trial in this matter, unmanageably cumbersome. Second, MBIA’s motion will not require the re-review of either BAC or Countrywide’s entire document production. MBIA seeks to lift the confidentiality restrictions only on (1) party deposition transcripts; (2) documents used as exhibits in party depositions; (3) expert reports; (4) documents used as exhibits to expert reports; and (5) materials relied on by expert witnesses. Defendants bear the burden of demonstrating that information within this limited collection of documents and transcripts is genuinely confidential, such that it should be filed under seal. *See Visentin v. DiNatale*, 2004 WL 1900407, at *2 (N.Y. Sup. Ct. Feb 13, 2004). Defendants cannot meet this burden as to the categories identified herein, particularly because MBIA will not seek to de-designate borrowers’ personal information or discovery material produced by third parties; to the extent such material comprises deposition exhibits or material relied on by experts, it need not be de-designated.

* * *

Accordingly, MBIA respectfully requests leave to file a motion to lift the confidentiality restrictions imposed by BAC’s and Countrywide’s over-designation of documents. Thank you for Your Honor’s consideration of this letter submission.

MBIA v. Countrywide Home Loans, et al.

Index No. 602825/2008

Respectfully submitted,

/s Peter Calamari

Peter Calamari

cc: Counsel for Defendants (by electronic mail)